

**Montgomery Ward & Co., Incorporated and United  
Food and Commercial Workers Union, Local  
No. 1439. Case 19-CA-13008**

August 9, 1982

**DECISION AND ORDER**

BY CHAIRMAN VAN DE WATER AND  
MEMBERS FANNING AND ZIMMERMAN

On December 11, 1981, Administrative Law Judge Gerald A. Wacknov issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief, and the Respondent filed a reply to the Charging Party's exceptions and brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent they are consistent with this Decision and Order.

We find no error in the Administrative Law Judge's rulings on evidentiary or procedural matters, and we accept his findings of fact. We disagree, however, with his recommendation that the complaint be dismissed. Contrary to his recommendation, we find that the Respondent violated Section 8(a)(1) of the Act by causing the arrest and removal of nonemployee union representatives Wright and Tillett from its public snackbar.

According to the Administrative Law Judge's factual findings, the two union representatives, Wright and Tillett, entered the snackbar on November 25, 1980, purchased beverages, and seated themselves at a table. They spoke with employees who approached them or sat at their table. When an employee, seated with other employees at an adjacent table, asked Wright about a union matter, he slid his chair to the adjacent table to talk to the employee. He did not speak in a loud voice, distribute literature to employees, or cause any disruption in the restaurant. The store manager, who was in the snackbar, then approached Wright and accused him of "bothering" employees. Wright asserted he was not bothering anyone and was entitled to talk to employees in the public restaurant. The store manager stated he was revoking the Union's visitation privileges, and, when Wright refused to leave, called the police who escorted Wright and Tillett from the premises. The two were later cited for criminal trespass.

On these facts, we conclude that the union representatives were not attempting to use the public snackbar in a manner inconsistent with its purpose. We do not consider Wright's move to the table adjacent to his, in response to a question by an employee seated there, to constitute the sort of circulating "from table to table" which an employer may lawfully prohibit.<sup>1</sup> His conduct was in no sense "table hopping" or solicitation of employees table by table, and was not inappropriate in a public restaurant. Therefore, the Respondent violated the Act when it required the representatives to leave and caused their arrest.<sup>2</sup>

**THE REMEDY**

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and from any like or related conduct, and to take certain affirmative action, set forth in the Order below, which is designed to effectuate the purposes and policies of the Act.

**AMENDED CONCLUSIONS OF LAW**

Substitute the following for Conclusion of Law 3:

"3. By summoning the police and having nonemployee union representatives removed from the snackbar and causing their arrest, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act."

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Montgomery Ward & Co., Incorporated, Yakima, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees by removing nonemployee union representatives from the snackbar and causing their arrest.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

<sup>1</sup> See *Montgomery Ward & Company, Inc.*, 256 NLRB 800 (1981); *Marshall Field & Company*, 98 NLRB 88 (1952).

<sup>2</sup> That the store manager may have seen Wright's conduct as an attempt to solicit employees at the adjacent table, as the Administrative Law Judge found, is not determinative of whether his action in causing the union representatives' removal from the snackbar violated the Act. See *N.L.R.B. v. Burnup and Sims, Inc.*, 379 U.S. 21 (1964).

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its Yakima, Washington, operation copies of the attached notice marked "Appendix."<sup>3</sup> Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

<sup>3</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interfere with, restrain, or coerce our employees by summoning the police and having nonemployee union representatives removed from the snackbar and causing their arrest.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by the Act.

MONTGOMERY WARD & CO., INCORPORATED

## DECISION

### STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge: Pursuant to notice, a hearing with respect to this matter was held before me in Yakima, Washington, on August

4, 1981. The initial charge was filed on December 3, 1980,<sup>1</sup> by United Food and Commercial Workers Union, Local No. 1439 (herein called the Union.)

Thereafter, on December 24, the Regional Director for Region 19 of the National Labor Relations Board (herein called the Board) issued a complaint and notice of hearing alleging a violation by Montgomery Ward & Co., Incorporated (herein called Respondent), of Section 8(a)(1) of the National Labor Relations Act, as amended (herein called the Act).

The parties were afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel and counsel for Respondent.

Upon the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following:

## FINDINGS OF FACT

### I. JURISDICTION

Respondent is an Illinois corporation and maintains and operates a retail department store in Yakima, Washington. In the course and conduct of its business operations at said store, Respondent has annual gross sales in excess of \$500,000 and annually purchases in excess of \$50,000 worth of goods and services from suppliers located outside the State of Washington. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

### II. THE LABOR ORGANIZATION INVOLVED

It is admitted that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. *The Issue*

The principal issue raised by the pleadings is whether Respondent violated Section 8(a)(1) of the Act by causing the arrest and removal of union business representatives from Respondent's premises.

#### B. *The Facts*

The salient facts are not in material dispute. Prior to November 25, Respondent's store manager, Jim Schaeffer, and other managers had permitted union organizers Michael Wright and Sam Tillett to enter Respondent's snackbar and converse with union employees during the course of the Union's organizational campaign, which commenced in September.

On November 25, the aforementioned union representatives entered the snackbar, purchased refreshments at the counter, and seated themselves at one of the 10 or 11 tables in the room in order to make themselves availa-

<sup>1</sup> All dates or time periods herein are within 1980, unless otherwise specified.

ble to union employees. They spoke with one or two employees who approached and/or sat down at their table. Approximately four employees, including Sherry Gimlin, were sitting at an adjacent table. Gimlin, who was acquainted with Wright, spoke to him about a union-related matter, and Wright moved his chair to the employees' table in order to place himself in a better position to converse with Gimlin.

Store Manager Schaeffer had been seated in the snackbar prior to the arrival of Wright and Tillett. Schaeffer approached Wright and said that Wright was bothering the employees. Wright asked employee Gimlin whether he was bothering her, and she replied that he was not. Thereupon, Wright replied that he was not bothering anyone and that he was entitled to converse with employees in a public area of Respondent's premises. Schaeffer replied that he was revoking the Union's visitation privileges and, upon Wright's continuing refusal to leave, summoned the police who arrested the union representatives and cited them for criminal trespass, escorting them from the premises in the view of various departmental employees.

Wright testified that he had no appointment to meet any employees at the snackbar that day, and that he and Tillett stopped in to find out if anybody had any questions regarding the Union and to contact employees that they had not been able to contact in connection with the organizational campaign. While Wright at first did not recall whether Schaeffer advised him that employees could come to his table if they so desired, he later admitted that Schaeffer did ask him to "move." The record does not indicate that Wright had been invited either by Gimlin or anyone else to sit at Gimlin's table.

Employee David Torrez, who had been seated at the table occupied by Wright, overheard the conversation between Wright and Schaeffer. Torrez testified that Wright said he had a "right to talk to the people here," and Schaeffer replied, "Not unless they're sitting with you."

Schaeffer testified that he was seated in the snackbar when Wright and Tillett entered. He observed several employees approach Wright's table and then leave the area. He then saw Wright walk over to Gimlin's table, speak to her briefly, and then return to his table. Several minutes later, Wright moved his chair midway into the aisle between the two tables and began talking to the employees seated there. Schaeffer testified that he had received previous complaints from employees about being intimidated or bothered by the union representatives, and that in his opinion the matter was developing into a potentially troublesome, dangerous, or disruptive situation as he believed that Wright was attempting to solicit the employees at Gimlin's table. Not knowing whether the employees at Gimlin's table would be annoyed by Wright, and believing that any potential argument or disagreement would be offensive to the nonemployee customers seated in the snackbar area, he asked Wright to return to his table, informing him that the employees could speak with him at his table if they so desired. Wright refused. Schaeffer then requested that Wright leave the store. Again, Wright refused. Thereafter the police were summoned.

Schaeffer acknowledged that Wright was not talking in a loud voice or handing out leaflets. Further, Schaeffer testified that he was enforcing applicable provisions of the third paragraph of the following company rule:

**DISTRIBUTION OF LITERATURE AND  
SOLICITATION  
ON COMPANY TIME FOR NON-COMPANY  
ACTIVITIES**

Employees may not distribute union literature or solicit membership in unions, or fraternal, religious, social, or political organizations on Company time, or while employees to whom literature is being distributed, or whose membership is being solicited, are on Company time. Company time is that time which the employee is scheduled to be on duty and for which the employee is being paid, excluding rest periods, lunch periods, and time before and after the employee's working day.

Solicitation is permitted on Company property so long as the employees, both those soliciting and those being solicited, are on their own time and the solicitation is conducted in a quiet and orderly manner and does not interfere with the operation of the Company's business. Meetings or speeches are not to be permitted; solicitation which results in disturbing or interfering with the work or function of any of the employees or department is forbidden; solicitation which is detrimental to maintaining the premises in a clean and attractive condition is forbidden.

Only employees of Wards shall be permitted access to any part of the Company's property not open to general public. Non-employee representatives may visit only those parts of the Company premises open to the general public—public cafeterias, public washrooms and sales floor. Such persons must conduct themselves in a quiet and orderly manner while on such Company premises; they may not distribute literature, make speeches, hold meetings, or disrupt the working time of any employee or the operation of any department.

Solicitations for charity drives and fund raising campaigns are to follow the guidelines for solicitation as outlined above. The Company generally supports one all-out community charity drive. Prior approval is required for any additional charity drives held on Company property. Such approval is to be made by the Retail or Catalog Store Manager, Catalog House Personnel Manager, Regional Personnel Director or Corporate Personnel Director.

*C. Analysis and Conclusions*

In *Marshall Field & Company*,<sup>2</sup> the Board found the employer's existing unwritten visitation or solicitation

<sup>2</sup> 98 NLRB 88 (1952), modified on other grounds and enfd. 200 F.2d 375 (7th Cir.).

rule to be lawful because it permitted nonemployee union organizers to meet by appointment with off-duty employees in the employer's public restaurant, provided the organizers did not move from table to table and conducted themselves discreetly. In *Montgomery Ward & Company, Inc.*,<sup>3</sup> the Board, applying the holding in *Marshall Field*, struck down the employer's written no-solicitation rule which prohibited solicitation by nonemployees at all times in the employer's facility, finding that the employer could not prohibit nonemployee organizers from using the cafeteria to meet, by appointment, with off-duty employees. In support of its finding, the Board specifically noted that (*Montgomery Ward & Co.*, 256 NLRB at 801):

The organizers did not move from table to table, try to distribute literature, speak to employees who were not off-duty, or in any other way create a disturbance. . . . We conclude, therefore, that they were attempting to use the cafeteria in a manner consistent with its purpose.

In the instant case, Respondent had on numerous occasions permitted union organizers to meet and converse with employees who sat at or approached the snackbar table occupied by the organizers, but prohibited Union Representative Wright from what reasonably appeared to Schaeffer, I find, as an attempt to solicit employees at an adjacent table. Thus, Wright did not advise Schaeffer that he had merely moved his chair to Gimlin's table in order to comprehend a question asked by Gimlin, who was soft-spoken and could not be readily understood, as Wright testified was his purpose, or that he thereupon intended to return to his original table. Rather, it was rea-

sonable for Schaeffer to conclude from Wright's response that Wright believed he could move from table to table and intended to exercise this prerogative. I credit Schaeffer and find that he first instructed Wright to return to his original table, and summoned the police only after Wright's refusal to obey this directive. Applying the holdings of the *Marshall Field* and *Montgomery Ward* cases, which emphasized an employer's right to prohibit union representatives from moving from table to table in such situations, I find that Schaeffer's conduct was not unreasonable under the circumstances. Therefore, I shall dismiss the complaint herein.

In his brief, but not at the hearing, the General Counsel moves to amend the complaint and alleges that Respondent "violated Section 8(a)(1) of the Act by misapplying its own written no-solicitation rule, and by promulgating a rule by application that was overly broad." Thus, the General Counsel apparently concedes that the aforementioned rule, on its face, is not unlawful. Further, even assuming *arguendo* that such a belated amendment to the complaint should be permitted, there appears to be no record evidence which would support such an allegation, and the General Counsel's brief does not sufficiently address the matter. Therefore, I shall dismiss the complaint herein.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not violated the Act as alleged.  
[Recommended Order for dismissal omitted from publication.]

<sup>3</sup> 256 NLRB 800 (1981).